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In The Supreme Court of the United States

MICHAEL STRATECHUK,

Petitioner,

v.

BOARD OF EDUCATION, SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT; BRIAN F. O'LEARY, in his official capacity as board president for the School District; and PETER P. HOROSHAK, in his official capacity as superintendent for the School District,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents an issue of exceptional public importance and one of first impression in this Court. It is an Establishment Clause challenge to a government policy that disfavors religion by banning the performance of traditional Christmas holiday music in a New Jersey public school district *for no other reason* than that the music is associated with a religious holiday. Troubling is the fact that the challenged policy was enacted in 2004 to exclude Christmas music from being played at the traditional year-end concerts held in the school district for decades; concerts that are similar to those held—at least for the time being—in school districts all across this Nation.

Christmas is a national holiday, and religious music in the public schools is one of the rich traditions of this season. The Third Circuit's opinion, if left unchecked, will ensure the demise of this tradition, and it will embolden those who use the Establishment Clause as a blunt instrument against religion to continue to do so. Consequently, this case is about much more than holiday music. It is about halting the proliferation of government policies and practices that disfavor religion. A decision with such potentially broad and troubling implications merits review by this Court.

Unfortunately, this Court's flawed Establishment Clause jurisprudence has promoted—and in many respects, encouraged—such policy decisions. Indeed, the Third Circuit's opinion represents an entrenched double standard for such cases: a minimal standard of proof and a very low threshold for finding a

constitutional violation in cases alleging "approval" of religion, and a very high standard of proof and an almost impossible threshold to cross for finding a constitutional violation in cases alleging "disapproval" of religion. This case presents an opportunity for the Court to abandon its much maligned jurisprudence in favor of one that respects our Nation's religious heritage and traditions.

1. Whether a public school district policy that bans the performance of traditional Christmas music for no other reason than that the music is associated with a religious holiday violates the Establishment Clause.

2. Whether a double standard exists for Establishment Clause challenges to government policy decisions that disfavor religion, requiring this Court to resolve the conflict by clarifying its jurisprudence and setting forth the appropriate test for such cases.

PARTIES TO THE PROCEEDING

The Petitioner is Michael Stratechuk ("Petitioner").

The Respondents are Board of Education, South Orange-Maplewood School District ("School District"); Brian F. O'Leary, in his official capacity as board president for the School District; and Peter P. Horoshak, in his official capacity as superintendent for the School District ("Respondents").

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OPINION BELOW

The opinion, App. 1a, appears at 587 F.3d 597.

JURISDICTION

The opinion of the panel was issued on November 24, 2009. A petition for panel rehearing and a petition for rehearing en banc were denied on December 30, 2009. App. 78a-79a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Establishment Clause of the United States Constitution provides that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I.

STATEMENT OF THE CASE

For decades prior to the 2004 *change* in school policy at issue here, the students in the School District performed holiday concerts that included music associated with religious holidays. These performances were consistent with and supported the educational goals of the music curriculum. App. 35a.

In 2003, for example, the School District held a holiday concert that included such notable religious holiday songs as "Joy to the World," "O'Come All Ye Faithful," "Hark, the Herald Angels Sing," and "Silent Night." App. 6a. This concert was consistent with board policy in effect at the time (Policy 2270), and the

music selections *promoted and supported specific goals of the music curriculum*. This longstanding policy and practice, however, would end in 2004.

In October 2004, the School District issued a memorandum that dramatically changed the prior policy and practice of the School District with regard to religious music, specifically including the *performance* of such music in the district and elsewhere. This new policy had the *express purpose* of prohibiting and censoring student performances of classic Christmas songs such as "Joy to the World," "O'Come All Ye Faithful," "Hark, the Herald Angels Sing," and "Silent Night" at holiday concerts in the School District and elsewhere. The 2004 policy change effectively banned these songs from *any* performance.[1] App. 8a-9a, 38a.

In 2005, the policy was expanded to ban the performance of *all religious music* in the elementary grades (K-5). App. 12a.

By banning the *performance* of certain religious music, the policy not only fails to serve a legitimate curricular goal, but it also negatively impacts the

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[1] Mr. Nicholas Santoro, the supervisor of the Department of Fine Arts for the School District, testified as follows:

> Q: You haven't performed any of these carols that we've mentioned, O, Holy Night, Joy to the World, Silent Night, you haven't heard of these carols being performed during a non-holiday season; have you?
>
> A: During a non-holiday season, no.
>
> Q: There would be no reason to perform them during April or the summertime –
>
> A: No, it would not make sense.

music curriculum because the music teachers tend to teach what the students will perform. Thus, the policy effectively eliminates certain music from the curriculum simply because it is religious.

The School District and the panel mischaracterize the effect of the policy change (and the testimony of the music teachers with regard to this effect) in order to avoid the obvious: that the challenged policy is detrimental to a comprehensive music program and undermines sound educational goals and principles.[2] As Ms. Barbara Eames, a district music teacher, testified in her deposition, the ban on the performance of music is like telling the students: "You're going to become an artist, but you can't pick up a brush. You're going to become a singer, but you can't sing this song." As a direct consequence of the challenged policy, a significant aspect of learning music in the district is "removed totally from the children's experience."

A close inspection of the *text* of the challenged policy as reflected in the 2004 memorandum demonstrates that the School District's departure from neutrality is *not* merely subtle, which would suffice for invalidating the policy under the First Amendment, but positively blatant:

- The policy directs the music teachers to "*avoid any selection which is considered to represent any religious holiday*," naming specifically Christmas and

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[2] Mr. Bill Cook, a district music teacher, testified that the policy change "would obviously *cut out a body of music that I might have otherwise selected from* to - - for performance at concerts." (emphasis added). He also testified that that the policy was *not* beneficial for the students and their learning of music.

Hanukkah. (emphasis added). This restriction "holds true for any vocal or instrumental setting." So even *religious* holiday music *without* words is prohibited (apparently because the students and the audience will silently recall the words).

- The policy "eliminated" "traditional carols" (i.e., Christmas carols) from the "Brass Ensemble repertoire." As the undisputed evidence shows, this required the Brass Ensemble *to eliminate 90% of its repertoire*. *See* App. 43a.

- The policy bans the Martin Luther King (MLK) Gospel Choir from performing at the Columbia High School holiday assembly for the student body *because* the choral music it performs has religious content. Prior to the 2004 policy change, the MLK Gospel Choir was a standard performer at this event.

- The policy prohibits any "printed programs for any Holiday concert" to have any "graphics which refer to the holidays, such as Christmas trees and dreidels." App. 8a-9a.

In addition to this undisputed evidence, the panel never confronts nor materially refutes the voluminous evidence regarding the circumstances and social facts surrounding the enactment of the challenged policy. Instead, it dismisses the evidence and ignores its relevance, stating: "The constitutionality of a school board's policy toward religion cannot be decided by reference to popular opinion." App. 23a. But this evidence has nothing to do with subjecting the issue to

a vote, as in the *Santa Fe* case that the panel cites.[3] App. 23a (citing *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 316-17 (2000)). Instead, it bears directly on the circumstances surrounding the adoption of this policy and the fact that it was reasonably likely to be perceived as disfavoring religion. To dismiss the reaction of the community, teachers, parents, and students to this inane policy as if their reaction had no relevance is contrary to controlling law.[4]

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[3] It should go without saying that the government can violate the constitutional rights of the majority as well as the minority—there is no "affirmative action" program under the Establishment Clause.

[4] The panel's approach was flatly rejected by this Court in *Santa Fe*:

> The [school district], nevertheless, *asks us to pretend that we do not recognize what every Santa Fe High School student understands clearly*—that this policy is about prayer. The [school district] further asks us to accept what is obviously untrue: that these messages are necessary to "solemnize" a football game and that this single-student, year-long position is essential to the protection of student speech. *We refuse to turn a blind eye to the context in which this policy arose*, and that context quells any doubt that this policy was implemented with the purpose of endorsing school prayer. . . . Therefore, the *simple enactment* of this policy, with the *purpose and perception* of school endorsement of student prayer, was a constitutional violation. We need not wait for the inevitable to confirm and magnify the constitutional injury.

Santa Fe Indep. Sch. Dist., 530 U.S. at 315-16 (emphasis added).

Unlike this Court in *Santa Fe*, the panel failed to recognize what every student, teacher, parent, and member of the South Orange/Maplewood community understands: the School District's policy targets certain music for disfavored treatment *because it is associated with a religious holiday*, thereby conveying a message

The illicit purpose and effect of the School District's ban on religious music was not lost on the community. The response to this new policy was widespread and vocal opposition. For example, parents circulated a "Petition Asking the Board of Education to Honor Religious Tolerance." The petition stated:

> *We, the undersigned, believe the Maplewood / South Orange Board of Education should practice religious tolerance in our schools, and reverse the recently established ban on the performance of religious music, the ban on holiday parties, and the ban on holiday concerts.*

See App. 43a.

Numerous members of the community spoke out against this policy at school board meetings, calling for its reversal. The School District received a flood of e-mails and letters complaining about the policy and its hostility toward religion. For example, a letter from Mark and Deborah Jacoby, who claim to "have attended instrumental and choral performances in both [Maplewood Middle School] and at [Columbia High School] for the past 8 years," insightfully notes: "Since instrumental music cannot inhibit or advance any religious point of view, it is difficult to imagine under what circumstances religious music *would* be permitted. This is not an interpretation of the Board's stated policy, *it is an outright reversal of that policy*."

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of disfavor of religion in violation of the Establishment Clause. There are *no* religiously-neutral criteria for the challenged policy's prohibitions—and the School District can point to none.

(emphasis added). Editorials and other news stories were written conveying similar sentiments. *See* App. 42a-43a.

Opponents of the new policy went so far as "organizing an 'illegal' night of Christmas Carols, Hanukah songs and other musical pieces banned by the South Orange/Maplewood Board of Education." This organized assembly occurred on December 21, 2004, and its sponsors "urged people of *all faiths* to join" as a protest to the new policy banning religious music. App. 44a.

Other protests, unrelated to the December 21, 2004, assembly, occurred on November 19, 2004, and again on November 22, 2004. During these events, a protestor played Christmas carols on a "boom box" in front of the Marshall School and the Columbia High School respectively.

District-sanctioned parent associations, such as the Columbia High School Music Parent's Association, demanded that the school board revisit its "drastic reinterpretation" of its policy, noting, *inter alia*, that "[r]*eligious* music is an important component in studying music education as much of the body of music today was inspired by, or commissioned for *religious* purposes." (emphasis added). The Maplewood Middle School HSA, a district-sanctioned organization, voiced similar opposition to the recent policy change. App. 43a.

Not only the community at large, but also the School District *music faculty*, expressed opposition to the new ban on religious music. In a November 23, 2004, letter from the teachers to the superintendent

and the Board of Education, the teachers stated: "The music teachers of the district would like to express their *extreme concern* and their *intense opposition* to *the change in the interpretation of the district's holiday music policy*, as was stated in a memo we received from Mr. Nicholas Santoro dated October 29, 2004. As we understand it, student vocal and instrumental groups *may not perform any religious music* at December concerts or at events outside of school." (emphasis added).

The music teachers continue:

> The attempt to purge the district's "holiday" programs of holiday music amounts to no less than censorship of both sacred musical masterpieces and non-sacred musical and cultural traditions . . . .
>
> *This policy is dangerous to the ideals of religious tolerance upon which this county* (sic) *was founded*, and *it tears at the fabric of American culture* that makes us different from the rest of the world. . . .
>
> As music teachers, we believe that the *religious* music that our choral and instrumental groups have performed in the past is an important part of our music curriculum and the national standards for music. . . .
>
> We would respectfully suggest that this policy re-interpretation creates more problems than it solves. Most importantly, the performance of *religious* music teaches children tolerance and

> the acceptance of others with different beliefs and heritages.

See App. 43a (emphasis added).

In closing, the music teachers urged the Board to "*re-instate the performance of holiday music*," which the School District has not done.

In addition to this collective response, individual teacher responses to the censorship of their music programs further demonstrate the illicit purpose and effect of the district's new policy banning the performance of religious music.

For example, Mr. Bill Cook, a district music teacher, responds on November 16, 2004, to Mr. Santoro's request to review his music program as follows:

> Nick:
> For the Holi . . . uh, Ram . . . uh, Chri . . . uh, December concert the 7th and 8th grade Orchestras at SOMS and MMS will be performing the following:
>
> The Star Spangled Banner by Key
> The Great Gate of Kiev by Mussorgsky
> Hava Nagila – traditional
> Concerto in D by JS Bach
> Winter Wonderland (maybe) by Smith and Bernard
>
> *I will try to keep all references to the birth of You Know Who, the 8 days of You Know What and the R month to a minimum.*

Thank you for your consideration.
God Bless,
Cook.

App. 41a-42a.

Mr. Vern "Bass" Miller had a similar response to Mr. Santoro:

Hi Nick,
Both Middle School Bands and Orchestras will be joyantly (sic) performing the following pieces:

1. Oh, Holy Night
2. Angels We Have Heard On High
3. We Three Kings

We will be joined by the school choruses singing these selections while we play.
Additionally, all performances will begin with a prayer and reading from the Holy scriptures (sic).
THOUGHT YOU MIGHT APPRECIATE OUR EFFORTS TO COMPLY WITH THE BOARD'S HOLIDAY MUSIC POLICY!!!
In truth,
MMS Concert: Monday, Dec 12th, 9:30 a.m.
Winter Wonderland
Dorian Rhapsody
Sing, Sing, Sing
SOMS Concert: Tuesday, Dec 13th, 9:30 a.m.
Winter Wonderland
Dorian Rhapsody
Peace,
Vern

App. 45a-46a.

Mr. John DeVita responds to Mr. Santoro's request by informing him that "the Gospel Choir proposes to sing the first verse of 'Lift Every Voice and Sing' in honor of Quanza (a *non religious* holiday)" and stating, "I trust that this will conform to the existing board policy."[5] App. 42a.

As the evidence shows, there is *no* valid, secular, educational purpose for banning the performance of Christmas music during Christmas, a national holiday. According to the National Association for Music Education, "[T]he study and performance of religious music within an educational context *is a vital and appropriate part of a comprehensive music education*. The omission of sacred music from the school curriculum would result in an incomplete educational experience."

REASONS FOR GRANTING THE PETITION

I. THE PANEL'S DECISION CONFLICTS WITH DECISIONS FROM THIS COURT AND OTHER CIRCUIT COURTS.

The panel's decision is contrary to the decisions of this Court in that it conflicts with the controlling principles of law set forth in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000), *Edwards v. Aguillard*, 482 U.S. 578 (1987), and

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[5] The fact that "Kwanza" music was considered permissible further demonstrates that the purpose of this policy was to ban religious music—particularly Christmas music—and not simply "cultural" or "holiday" music.

Epperson v. Arkansas, 393 U.S. 97 (1968), among others, as argued more fully below.

The decision is also contrary to decisions from other circuit courts, which make plain that the performance of traditional Christmas music in the public schools is not prohibited by the Constitution. Rather, to ban such music because it is religious conveys a message of hostility and not one of neutrality as required by the Establishment Clause. *See Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 407-08 (5th Cir. 1995) ("*A position of neutrality towards religion* must allow choir directors to recognize the fact that most choral music is religious. Limiting the number of times a religious piece of music can be sung is tantamount to censorship and *does not send students a message of neutrality*. . . . Such animosity towards religion is *not required or condoned by the Constitution*.") (emphasis added); *Florey v. Sioux Falls Sch. Dist.*, 619 F.2d 1311, 1317 n.5 (8th Cir. 1980) (upholding against an Establishment Clause challenge the study and performance of religious songs in the public schools, including the singing of traditional Christmas carols); *Bauchman v. West High Sch.*, 132 F.3d 542, 554-56 (10th Cir. 1997) (selecting Christian religious music and Christian religious sites for performance by school choir did not violate the Establishment Clause and noting that "it is recognized that a significant percentage of serious choral music is based on religious themes or text").

II. THE ESTABLISHMENT CLAUSE SHOULD NOT TOLERATE POLICY DECISIONS THAT DISFAVOR RELIGION.

This Court has previously stated that when evaluating claims under the Establishment Clause "the Constitution also requires that we keep in mind the myriad, subtle ways in which Establishment Clause values can be eroded and that we guard against other different, yet equally important, constitutional injuries." *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 314 (internal citation omitted). One such way in which these "values" are eroded is by the passage of a government policy that singles out religious music for disfavored treatment because it is associated with a religious holiday. An evenhanded application of prior precedent should compel a reversal in this case. Unfortunately, with little exception, the application of this Court's modern day Establishment Clause jurisprudence has led the law to disfavor religion, thereby promoting such policy decisions. Consequently, a substantial revision of this Court's jurisprudence is in order.

In *Lynch v. Donnelly*, 465 U.S. 668 (1984), this Court stated:

> It has never been thought either possible or desirable to enforce a regime of total separation. Nor does the Constitution require complete separation of church and state; *it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any*. Anything less would require the callous indifference we have said was never intended by the Establishment Clause. Indeed, we have

> observed, such hostility would bring us into war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion.

Id. at 673 (internal punctuation, quotations, and citations omitted) (emphasis added).

In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993), the Court acknowledged the following: "In our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a *particular* religion or *of religion in general*." (emphasis added).

Despite an occasional appearance of neutrality and suggestion that the Constitution is not hostile toward religion, the reality is that this Court's Establishment Clause jurisprudence is frequently used as a blunt instrument against all thing religious—particularly those that are part of our national traditions. This case is just such an example.

While some on this Court still believe that our Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any," *Lynch*, 465 U.S. at 673, this case will afford the Court the opportunity to breathe new and lasting life into this fundamental principle of constitutional law that is largely ignored by the lower federal courts. As this case shows, the Court's prophetic observation in *Lynch* that "[a]nything less would require the callous indifference [that] was never intended by the Establishment Clause," thereby bringing "us into war with our national tradition" has

come to fruition. It is time to reverse this harmful and divisive trend.

III. THE PANEL'S DECISION EVISCERATES CLAIMS CHALLENGING GOVERNMENT POLICIES THAT DISFAVOR RELIGION.

By dismissing Petitioner's evidence of an illicit purpose and effect and crediting Respondents' contrary, self-serving assertion that they were simply seeking to avert an Establishment Clause violation, the panel's decision creates a bright line rule that essentially undermines all claims advanced under a "disapproval" of religion theory. Permitting the panel's decision to stand would pave the road for removing all religious references from official recognition simply because they represent religion. The pernicious effect of the panel's decision is clear. *See, e.g., School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 306 (1963) (concurring opinion) (noting that an "untutored devotion to the concept of neutrality" can lead to "a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious").

In this case, by banning a longstanding and permissible practice—the performance of Christmas songs during the holiday season—for no other reason than that the music is associated with a religious holiday, Respondents have conveyed an impermissible message of disapproval of religion.

Throughout its decisions, this Court has consistently described the Establishment Clause as forbidding not only state action motivated by a desire to promote or "advance" religion, *see, e.g., County of Allegheny v. ACLU*, 492 U.S. 573, 592 (1989), but also

actions that tend to "disapprove of," "inhibit," or evince "hostility" toward religion. *See Edwards v. Aguillard*, 482 U.S. 578, 585 (1987) ("disapprove"); *Lynch*, 465 U.S. at 673 ("hostility"); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 788 (1973) ("inhibi[t]"). Our Constitution prohibits government action that "foster[s] a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 846 (1995) (emphasis added); *see Lynch*, 465 U.S. at 668, 673 (stating that the Constitution "forbids hostility toward any" religion); *see also Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 532 (stating that the Establishment Clause "forbids an official purpose to disapprove of a particular religion or of religion in general").

A state-sponsored message of disapproval of religion, as evidenced by Respondents' policy, sends a message to Petitioner and other Christians that their religion is disfavored in the community. *See County of Allegheny*, 492 U.S. at 597. The First Amendment mandates neutrality toward religion and forbids hostility aimed at a particular faith. *Cf. Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 520 (striking down a law that targeted a particular religious practice).

More recently, in *Van Orden v. Perry*, 545 U.S. 677 (2005), a case in which a plurality of justices upheld the 40-year display of the Ten Commandments on the grounds of the Texas State Capitol, Justice Breyer, in his concurring opinion, stated,

> [The removal of the religious symbol], based primarily upon the religious nature of the tablets' text would, I fear, lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions. Such a holding might well encourage disputes concerning the removal of longstanding depictions of the Ten Commandments from public buildings across the Nation. *And it could thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid.*

Id. at 704 (emphasis added).

While the language from these cases appears to support a "disapproval of religion" claim, the practical reality is that such claims are given little traction by the lower courts, as this and other cases demonstrate. *See Borden v. School Dist. of East Brunswick*, 523 F.3d 153 (3d Cir. 2008) (upholding a prohibition on a football coach's participation in *student-led* prayer by silently bowing his head during grace and taking a knee during locker room prayer); *Busch v. Marple Newtown Sch. Dist.*, 567 F.3d 89 (3d Cir. 2009) (upholding a school district's refusal to allow a parent to read Bible verses to her son's kindergarten class during the student's "All About Me" week); *American Family Ass'n v. City & County of San Francisco*, 277 F.3d 1114, 1124 (9th Cir. 2002) (holding that San Francisco's resolution condemning a religious organization's advertisement opposing homosexuality did not violate the Establishment Clause); *Vernon v. City of Los Angeles*, 27 F.3d 1385, 1396 (9th Cir. 1994) (stating that "[t]he government neutrality required under the Establishment Clause is . . . violated as

much by government disapproval of religion as it is by government approval of religion," but finding no violation); *O'Connor v. Washburn Univ.*, 416 F.3d 1216 (10th Cir. 2005) (upholding a government display of an anti-Catholic statue against an Establishment Clause challenge); *cf. Nurre v. Whitehead*, 580 F.3d 1087 (9th Cir. 2009), *cert. denied*, 559 U.S. __ (2010) (upholding a ban on the student performance of "Ave Maria" at a public school graduation).[6] At a minimum, there is much confusion in the lower federal courts that only this Court can clarify.

Unfortunately, in the Third Circuit, and elsewhere, even the most subtle and inconsequential act *favorable* to religion is quickly held impermissible, *see, e.g.*, *Borden v. School Dist. of East Brunswick*, 523 F.3d 153 (3d Cir. 2008) (prohibiting a football coach's participation in *student-led* prayer by silently bowing his head during grace and taking a knee during locker room prayer); *Busch v. Marple Newtown Sch. Dist.*, 567 F.3d 89 (3d Cir. 2009) (refusing to allow a parent

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[6] *Compare Murray v. City of Austin*, 947 F.2d 147, 158 (5th Cir. 1991) (acknowledging that removing Christian symbols, such as a cross, from all public displays "evinces not neutrality, but instead hostility, to religion" and holding that the inclusion of a Christian cross in the city insignia did not violate the Establishment Clause); *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 407-08 (5th Cir. 1995) ("Limiting the number of times a religious piece of music can be sung is tantamount to censorship and *does not send students a message of neutrality*. . . . Such animosity towards religion is *not required or condoned by the Constitution*.") (emphasis added); *ACLU v. Mercer County*, 432 F.3d 624, 638-39 (6th Cir. 2005) (upholding the public display of the Ten Commandments and observing that the "repeated reference to 'the separation of church and state'" is an "extra-constitutional construct [that] has grown tiresome").

to read Bible verses to her son's kindergarten class during the student's "All About Me" week), making hostility to religion the standard to comport with the Establishment Clause, as this case further demonstrates. This view of the Court's jurisprudence inevitably leads to a view of the law that is disapproving of religion.

An official policy that makes exclusions based on religious criteria is not *neutral* toward religion, but rather hostile to it. And even *subtle departures from neutrality* are prohibited under this Court's prior decisions. *See Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 534; *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 314 (admonishing the courts to "keep in mind the myriad, subtle ways in which Establishment Clause values can be eroded" and to "guard against other different, yet equally important, constitutional injuries"); *see also School Dist. of Abington Township*, 374 U.S. at 306 (concurring opinion) (noting that an "untutored devotion to the concept of neutrality" can lead to "hostility to the religious"). But these principles are often cast aside in favor of an approach that employs curettage and disinfectant for all that partakes of the religious in public life.

In the present case, even apart from the overwhelming contextual evidence, the literal text of the challenged policy as reflected in the October 2004, memorandum violates the Establishment Clause *on its face* because it expressly mandates disfavor toward religion by officially censoring certain music *because of its religious content* and for no other reason. *See Santa Fe Indep. Sch. Dist.*, 530 U.S. at 314 (holding that "the *mere passage* by the District of a policy" that has the

"purpose and perception" of favoring religion violates the Constitution) (emphasis added).

An examination of the *entire* record further demonstrates that the School District's departure from neutrality was anything but "subtle"; it created the very kind of political divisiveness along religious lines that the Establishment Clause was designed to avoid. The panel's description of the challenged policy as one that promoted "complete religious neutrality," App. 3a, is belied by the undisputed evidence, specifically including the immediate and overwhelming public and faculty outrage over the policy precisely because it disfavored religion. If the School District had chosen to use genuinely *neutral* educational criteria for its policy toward the performance of music, it would have continued teaching its decades-old music curriculum and performing religious music selections found in its standard music texts, and there would be no constitutional problem. But, instead, it chose to use *religious* criteria to censor the music curriculum—literally combing that curriculum and banning the performance of music the censors deemed religious. Thus, it is implausible to argue, as the panel does, that the School District's policy promotes "complete religious *neutrality*."

Also troubling is the panel's reliance on Amici's argument that "Establishment Clause jurisprudence recognizes that neutrality towards religion is quite distinct from hostility towards it." App. 22a. This is troubling because the Third Circuit does not extend this same argument to cases that allege official *approval* of religion. When such approval—no matter how slight—is alleged, there is invariably a hair-trigger finding that the Establishment Clause has

been violated. *See, e.g., Borden*, 523 F.3d at 153; *Busch*, 567 F.3d at 89. But where official *disapproval* of religion is alleged—no matter how blatant—there is invariably a finding that this disapproval is mere "neutrality." The resulting one-sided view of the Establishment Clause in itself disfavors religion.

The panel further quotes and assents to Amici's erroneous view that "[w]ere that not the case, almost every government action vis-à-vis religion would fall into one of two columns—pro- or anti-religious, promoting or hostile to—and be subject to Establishment Clause attack in either event." App. 23a. This case demonstrates the falsity of this claim because there is a third position, which is *true* neutrality toward religion. Unfortunately, Amici's argument does apply in the Third Circuit and elsewhere to cases that are considered "pro-" religion, resulting in a reflexive finding of a constitutional violation. In contrast, cases challenging policies that disfavor religion are simply dismissed as a lawful means of promoting neutrality, albeit a false neutrality. Thus, in the Third Circuit as well as others, "neutrality" does equate to hostility.

In sum, there is no dispute that the challenged policy targets for *disfavored* treatment certain music *only* because it is associated with a *religious* holiday. The performance of music associated with secular holidays, such as Kwanza, is permitted, but music associated with the Christian holiday of Christmas is banned *for no other reason* than that it is a *religious* holiday. Such a policy can hardly be considered neutral toward religion. And, as the record amply reveals, this was not a benign policy; it created

tremendous divisiveness in the community along religious lines.

As noted previously, the panel's decision represents an entrenched and improper double standard for Establishment Clause cases that requires only a minimal standard of proof for finding a constitutional violation in "approval" cases and a very high standard of proof for finding a constitutional violation in "disapproval" cases. This case presents a perfect opportunity to eliminate this double standard in the lower federal courts by applying the Establishment Clause in an evenhanded manner, as required by this Court's precedent.

In the final analysis, the panel's decision eviscerates all case law prohibiting government disapproval of religion. However, the lack of clarity from this Court, particularly with regard to "disapproval" claims, is a major contributing factor for the inconsistent opinions below.

IV. THE COURT'S CURRENT ESTABLISHMENT CLAUSE JURISPRUDENCE IS IN DISARRAY AND LEADS TO INCONSISTENT RESULTS THAT PROMOTE HOSTILITY TOWARD RELIGION.

The Court's modern Establishment Clause jurisprudence is in "hopeless disarray," *Rosenberger*, 515 U.S. at 861 (Thomas, J., concurring in the judgment), and in need of "[s]ubstantial revision," *County of Allegheny*, 492 U.S. at 656 (Kennedy, J., concurring in part and dissenting in part); *see also Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 45 n.1

(2004) (Thomas, J., concurring in the judgment) ("Our jurisprudential confusion has led to results that can only be described as silly."); *Edwards*, 482 U.S. at 639 (Scalia, J., dissenting) (criticizing the Court's "embarrassing Establishment Clause jurisprudence"); *Wallace v. Jaffree*, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting) ("It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly 40 years."); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 399 (1993) (Scalia, J., concurring in the judgment) ("I agree with the long list of constitutional scholars who have criticized *Lemon* and bemoaned the strange Establishment Clause geometry of crooked lines and wavering shapes its intermittent use has produced.").

Inconsistent results—results which tend to disfavor religion—in the inferior federal courts can be directly attributed to the insufficient and inconsistent guidance given to them by this Court. *See, e.g., Bauchman v. West High Sch.*, 132 F.3d 542, 551 (10th Cir. 1997) ("To the extent the Supreme Court has attempted to prescribe a general analytic framework within which to evaluate Establishment Clause claims, its efforts have proven ineffective."); *ACLU v. Schundler*, 168 F.3d 92, 113 (3d Cir. 1999) (dissent) ("Until the Supreme Court decides a case in which a majority opinion of the Court utilizes a clear test to analyze a religious display, we are left with fact-specific inquiries that focus on the size, shape, and inferential message delivered by displays with religious elements, leaving almost any display that has a religious symbol in it open to challenge and any such display that has

secular elements, no matter how trivial, open to judicial approval."); *Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 166 n.7 (5th Cir. 1993) ("We have eschewed the tripartite *Lemon* analysis in favor of a more case-bound approach because we believe that a fact-sensitive application of existing precedents is more manageable and rewarding than an attempt to reconcile the Supreme Court's confusing and confused Establishment Clause jurisprudence.").

This case presents an opportunity for the Court to clarify its Establishment Clause jurisprudence in the context of reviewing *for the first time* a case involving disfavor of religion. Petitioner suggests that (a) in cases of government *accommodation* of historic or traditional practices involving religion, such as the performance of Christmas music during the holiday season, this Court should adopt a rational basis standard of review; and (b) in cases of government disfavor of or hostility toward religion, such as Respondents' policy decision to ban the performance of traditional Christmas music in their school district simply because it is music associated with a religious holiday, a strict scrutiny standard should apply. Such an approach is consistent with our history and traditions, *see, e.g.*, *Lamb's Chapel*, 508 U.S. at 400 (Scalia, J., concurring in the judgment) ("What a strange notion, that a Constitution which itself gives 'religion in general' preferential treatment (I refer to the Free Exercise Clause) forbids endorsement of religion in general."), and it provides a well-established analytical framework within which to evaluate Establishment Clause claims. This framework would provide needed guidance for the lower courts and would stem the tide of cases and opinions disfavoring religion.

A. THE ESTABLISHMENT CLAUSE PERMITS ACKNOWLEDGMENT OF RELIGION, BUT FORBIDS HOSTILITY TOWARD ANY.

"We are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). "There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Van Orden*, 545 U.S. at 686 (quoting *Lynch*, 465 U.S. at 674). Examples of this historical acknowledgment include Executive Orders recognizing religiously grounded national holidays, such as Christmas and Thanksgiving, Congress directing the President to proclaim a National Day of Prayer each year, the printing on our currency of the national motto, "In God We Trust," the display of the crèche during Christmas, *see Lynch*, 465 U.S. at 675-77, 686, and representations of the Ten Commandments on government property. *Van Orden*, 545 U.S. at 677; *see also Marsh v. Chambers*, 463 U.S. 783 (1983) (upholding legislative prayer); *McGowan v. Maryland*, 366 U.S. 420 (1961) (upholding Sunday closing laws).

In *Lynch*, the Court concluded its recitation of examples of government recognition of religion by stating,

> One cannot look at even this brief resume [of historical examples] without finding that our history is pervaded by expressions of religious beliefs. . . . Equally pervasive is the evidence of accommodation of all faiths and all forms of religious expression, and hostility toward none. Through this accommodation, as Justice

> Douglas observed, governmental action has "[followed] the best of our traditions" and "[respected] the religious nature of our people." [*Zorach*, 343 U.S. at 314].

465 U.S. at 677-78.

As this Court observed: "Recognition of the role of God in our Nation's heritage has also been reflected in our decisions. We have acknowledged, for example, that religion has been closely identified with our history and government, and that the history of man is inseparable from the history of religion." *Van Orden*, 545 U.S. at 687 (internal quotations and citations omitted); *see also Elk Grove Unified Sch. Dist.*, 542 U.S. at 26 (Rehnquist, C.J., concurring in judgment) ("Examples of patriotic invocations of God and official acknowledgments of religion's role in our Nation's history abound."); *id.* at 35-36 (O'Connor, J., concurring in the judgment) ("It is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes, and oaths."); *Lynch*, 465 U.S. at 675 ("Our history is replete with official references to the value and invocation of Divine guidance.").

The performance of Christmas music in the public schools has long been a part of our national traditions and remains so today. *Cf. Van Orden*, 545 U.S. at 688 ("[A]cknowledgments of the role played by the Ten Commandments in our Nation's heritage are common throughout America."). Governmental suppression of this tradition is the antithesis of the value of religious tolerance that underlies the Establishment Clause.

See, e.g., Lamb's Chapel, 508 U.S. at 400 (Scalia, J., concurring in the judgment). This case is illustrative.

Thus, while the performance of Christmas music in our public schools is a permissible way to acknowledge that we are a religious people with a long and rich religious heritage, policy decisions that disfavor religion do not enjoy such a favorable history and should, therefore, be treated differently under the law. *See Lynch*, 465 U.S. at 673 (stating that the Constitution "forbids hostility toward any" religion) (internal punctuation, quotations, and citations omitted); *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 532 (stating that the Constitution "forbids an official purpose to disapprove of a particular religion or of religion in general").

Consequently, this Court should adopt a rational basis standard of review for longstanding religious practices and traditions, such as the performance of traditional Christmas music in public schools. This standard would be consistent with the history and traditions of our Nation and the framework of the First Amendment, and it would provide a well-established test for the lower courts to apply. Moreover, it would remove from the calculus the "complying with the Establishment Clause" claim so often invoked as justification for the government's hostility toward religion. *See Widmar v. Vincent*, 454 U.S. 263, 270-71 (1981) (holding that the state's interest in complying with the Establishment Clause did not justify discrimination against a religious group).

On the other hand, government action that is hostile toward religion, such as the policy decision presently before this Court, does not share the same

history and tradition and should therefore be treated under a higher standard of review.

B. THIS COURT SHOULD ADOPT A STRICT SCRUTINY STANDARD OF REVIEW FOR GOVERNMENT ACTIONS THAT DISFAVOR RELIGION UNDER THE ESTABLISHMENT CLAUSE.

Because the Constitution *forbids* hostility toward a particular religion or of religion in general, such practices should be judged under the Establishment Clause by applying a strict scrutiny standard of review. *See Lynch*, 465 U.S. at 673 (stating that the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any"); *cf. Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 520 (applying strict scrutiny to strike down law under the Free Exercise Clause that targeted a particular religion). Thus, a government action that disfavors religion, such as the policy decision at issue here, should be held "invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." *Id.* at 533. Here, there is no compelling interest—or indeed even a rational basis—to justify banning the religious music.

In the final analysis, Respondents seek to mask their religiously hostile policy decision to ban the performance of traditional Christmas music by hiding behind the muddled Establishment Clause jurisprudence of this Court. Respondents should not be allowed to do so.

CONCLUSION

While it is evident that the panel's decision conflicts with several decisions from this Court and other circuit courts so that consideration is necessary to secure and maintain uniformity of decisions on an important issue of federal law, the crux of the problem is that this Court's Establishment Clause jurisprudence is in need of substantial revision. This Court should grant review of this case and take the opportunity to abandon the present Establishment Clause framework, which tends to be hostile toward religion, in favor of a workable standard that is not only capable of consistent application, but that is consistent with our Nation's religious history.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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